Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs	)))	**CC Docket No. 01-92**
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	**CC Docket No. 95-185**
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	**CC Docket No. 96-98**

Reply Comments of the Missouri Independent Telephone Company Group Regarding the September 6, 2002 Petition for Declaratory Ruling filed by T-Mobile USA, Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc.

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Summary

On the date the Act took effect, SWBT terminated wireless traffic to the MITG companies as an interexchange carrier, and paid the MITG companies terminating access. The Safe Harbor provisions of the Act preserve the manner in which exchange access, information access and exchange service was being provided prior to the Act. SBC Communications requests the Commission to hold that transit carriers are not responsible for charges assessed by terminating carriers. The transit function unilaterally entered into between CMRS providers and large ILECs do not displace the trunking obligations those large ILECs have with small ILECs not a party to those agreements. Under the 'Filed-Tariff' Doctrine, the small ILECs' filed tariffs apply until there is an approved interconnection agreement and reciprocal compensation arrangement. There are no approved agreements that have been requested and negotiated with the MITG companies. Filed tariffs are to be interpreted when analyzing party obligations under the Act. The Commission should not grant SBC Communications' request.

The CMRS providers request this Commission to find state approved wireless termination service tariffs unlawful. The Missouri wireless termination service tariffs are compensation arrangements approved by the Missouri Public Service Commission (MoPSC) when no reciprocal compensation arrangement has been pursued by the CMRS provider and approved by the MoPSC. The MoPSC has found these tariffs do not preempt CMRS providers from exercising their rights under sections 251 and 252. The CMRS providers have made no request for a physical connection with the MITG companies pursuant to the procedures under sections 332 and 201, or 251 and 252 of the Act. CMRS providers have not followed the rural ILEC exemption procedures of making a bona fide request for interconnection and filing such requests with the MoPSC pursuant to section 251(f)(1). The MoPSC has authority under

sections 251(d)(3) and 261 to act to approve wireless termination service tariffs. The Federal courts have held that states may enforce tariff provisions that do not violate a carrier's rights under negotiated interconnection agreements. The Missouri wireless termination service tariffs do not violate any carrier's rights under an agreement.

The CMRS providers assert their preference for indirect interconnection with small and rural LECs, and claim small companies are obligated to accept 'de facto' bill and keep in the absence of an approved reciprocal compensation arrangement. There is no mention of 'de facto' bill and keep in the Act. The provisions for bill and keep in the Act contemplate such a compensation mechanism pursuant to action by a state commission, not pursuant to the practices of CMRS providers. The 'de facto' bill and keep imposed by CMRS providers does not meet the requirements under the Act for bill and keep, it has not been agreed to by the MITG companies, and the 'ongoing obligations' imposed by 'de facto' bill and keep have not been filed with the MoPSC as required under section 252(a)(1). 'De facto' bill and keep is not a lawful practice.

The MITG companies negotiate in good faith for direct interconnection because they want to be able to measure the traffic, record the jurisdiction of traffic, agree to billing arrangements, collection arrangements, and service termination arrangements instead of rely on inadequate call detail records of a transiting carrier. Without direct interconnection, the MITG companies cannot lawfully arrange to reciprocate traffic without "slamming" customer calls in violation of intraLATA presubscription. The CMRS providers have no duty to negotiate or establish interconnection agreements, and the MITG companies cannot initiate and force these arrangements onto the CMRS providers under the Act. The wireless terminations service tariffs provide a compensation mechanism when the CMRS providers do not seek to interconnect with the MITG companies pursuant to the Act. The CMRS providers request should be denied.

I. Independent LECs across the country share the MITG companies' concerns

Notably, the independent LECs from various states have all expressed similar concerns regarding the T-Mobile Petition for Declaratory Judgment. These LECs all share similar experiences pertaining to the complete lack of bargaining power with respect to negotiations and compensation of wireless traffic terminated to independent LEC exchanges on an indirect, transiting basis through unilateral agreements between the CMRS providers and RBOCs or large ILECs. In Missouri, the Wireless Termination Service Tariffs have helped to level the playing field by ensuring compensation and encouraging negotiations without preempting the CMRS providers' rights under the Act.

II. Reply to SBC Communications' request pertaining to transit providers.

A. The Safe Harbor provisions of the Act.

The 1996 Act set forth certain "Safe Harbor" rules in 47 U.S.C. §251(g). Under section 251(g), on the effective date of the Act, each wireline LEC was required to provide exchange access, information access, and exchange service for such access to interexchange carriers and information service providers in the same manner as applied to such carrier on the date immediately preceding the Act, under any court order, consent decree, regulation, order, or policy of the Commission, until the restrictions and obligations are explicitly superseded. Until superceded, "such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission." 47 U.S.C. §251(g).

On the date the Act took effect, SWBT terminated wireless traffic to the MITG companies as an interexchange carrier, and paid the MITG companies terminating access.[1] The

[1] In Missouri, the MoPCS has held that SWBT is obligated to pay the rural ILECs' access rates pursuant to their access tariffs for wireless terminating traffic terminated by SWBT from 1990 to February of 1998. See *In the Matter of United Telephone Company*, Case No. TC-96-112,

MoPSC then approved a revision to SWBT's Wireless Interconnection Service Tariff to terminate SWBT's function at its meetpoint with the third party LECs, thereby eliminating its obligation to pay terminating access charges on wireless traffic terminated pursuant to SWBT's tariff.[2] To the extent wireless traffic is not terminated pursuant to SWBT's PSC Mo No 40 Wireless Interconnection Service Tariff, the MITG companies believe SWBT's obligations are based on the MITG's access service tariffs from which SWBT gains access to their networks[3]. Under the MITG position, existing access compensation is the safe harbor that applies until the agreement is effective. There is no issue as to what applies prior to the agreement. The access regime was not disturbed by the Act until a reciprocal compensation arrangement superseded it.

In this proceeding, SBC Communications, Inc. requests this Commission to hold that, "if a carrier agrees to provide transit services, it is not responsible for charges assessed by the terminating carrier."[4] Such a holding would permit an RBOC or other large ILEC to *unilaterally* change the status of its trunking arrangements with small LECs by entering into contracts with third parties, to which the small LECs are not a party. In Missouri, these type of unilateral arrangements have led to: (1) the RBOC, SWBT, asserting that it is not required to compensate the MITG companies because it is required to transit the wireless traffic and asserting that the CMRS provider originating the traffic is responsible to pay; and (2) the CMRS providers

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Report and Order, issued April 11, 1997; *Chariton Valley and Mid-Missouri=s Complaint against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999. SWBT is not the ILEC in the MITG exchanges, it's only capacity in the MITG exchanges is as an interexchange carrier or IXC.

[2] SWBT states that today over 99 percent of the wireless traffic it terminates is pursuant to interconnection agreements (to which none of the MITG companies have been made a party), not its tariff.

[3] The MITG companies' access tariffs apply unless and until replaced by another tariff (such as the wireless termination service tariff of three MITG companies) or a Commission-approved interconnection agreement or traffic termination agreement.

[4] Initial Comments of SBC Communications, Inc. at p. 5.

refusing to compensate the MITG companies often citing the fact that they have no compensation agreement in place with the MITG companies which the MoPSC required them to have as part of the transiting arrangement before sending the traffic they refuse to pay for. This is an untenable situation for small LECs. Approval of SBC Communications' request would permit transit carriers such as SWBT to unilaterally displace their trunking obligations. This Commission should refuse SBC Communications' request.

B. The 'transit' function does not displace trunking obligations of RBOCs or large LECs

The MoPSC's approval of SWBT's revised tariff was based on it's understanding that SWBT would perform a 'transit' function for the wireless carriers. The requirements set forth under the 1996 Act and *Interconnection Order* are with respect to telecommunications carriers in their capacities as local exchange carriers, incumbent local exchange carriers, CMRS providers and interexchange carriers, not as 'transit' providers. 47 U.S.C. 251(c)(2) sets forth the obligation of *incumbent* local exchange carriers to interconnect with *requesting* telecommunication carriers. SWBT is not the incumbent local exchange carrier in the MITG exchanges. No CMRS provider has requested interconnection in the MITG exchanges. SWBT's only capacity in the MITG exchanges is that of an interexchange carrier.

In 2000, the FCC decided a complaint case involving paging carriers and local exchange carriers (LECs). Paging carriers have the same status as CMRS providers in this regard. In *TSR Wireless, LLC, et al. v. US West Communications, Inc., et al.*, File Nos. E-98-13 et al., *Memorandum Opinion and Order*, FCC 00-194 (2000 FCC LEXIS 3219) rel. June 21, 2000, p. 19, para. 3. In that case, the FCC observed:

> Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. **Such traffic falls under our reciprocal compensation rules if carried by the**

incumbent LEC, and under our access charge rules if carried by an interexchange carrier.

Paragraph 26 of that same Order recognized that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.

The FCC has recently ruled that carriers such as SWBT have no obligation to transit traffic at TELRIC rates:

> "We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(a)(1) of the Act would not require that service to be priced at TELRIC." [5]

SBC Communications notes in it's initial comments, "the Bureau has confirmed that no Commission rule requires carriers to provide indirect interconnection and transit services, and even if carriers are obligated to do so, they are permitted to charge market rates for those services."[6] SBC acknowledges that it is not required to transit at TELRIC rates, thus if SBC, or any other RBOC or large LEC, chooses to enter into transiting arrangements with CMRS providers, then the rate should be set to take into consideration the cost of termination on the small LECs' networks under the trunking arrangements these RBOCs and large LECs have with the small LECs. Such costs are based on the approved tariffs, including the wireless termination service tariffs, of the small LEC. The CMRS providers can undertake a cost/benefit analysis and make a business decision to either transit traffic indirectly based on the costs of transit and

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[5] See the July 17, 2002 Memorandum Opinion and Order in the Matter of the Petition of Worldcom, Cox, and AT&T versus Verizon-Virginia, DD Docket No. 00-218, paragraph 117.
[6] Initial Comments of SBC Communications, Inc. at p. 5.

termination pursuant to approved tariffs, or to terminate their traffic directly and obtain a negotiated rate by availing themselves of the FCC procedures under the Act.

C. The 'Filed-Tariff' Doctrine applies until there is an approved interconnection agreement and reciprocal compensation arrangement, and filed tariffs are to be interpreted when analyzing party obligations under the Act

Under the "filed tariff doctrine", the MITG companies' tariffs (i.e. wireless termination service tariffs or access tariffs) are the exclusive source of terms and conditions applicable to SWBT and the CMRS providers as customers[7]. Unless an approved reciprocal compensation arrangement applies, the MITG tariffs apply to traffic delivered by SWBT. In *Three Rivers Telephone Cooperative v. U.S. West Communications*, the Ninth Circuit Court of Appeals explained:

> Because the Independents' tariffs form the exclusive source of the obligations between the independents and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves.[8]

In this case, the MITG companies' access and wireless termination service tariffs provided the exclusive source of the terms, conditions, and rates for the completion of wireless-

[7] *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568 (Mo. App. E.D. 1997). The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of published tariffs. *Id*. at 570. "Neither a customer's ignorance nor a utility's misquotation of the applicable tariff provides refuge from the terms of the tariff." *Id*. Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the exclusive source of the terms and conditions governing the provision of service of a carrier to its customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002).

[8] *Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, D.C. No. CV-99-00080-RFC, *Memorandum Opinion*, filed August 27, 2002. (emphasis added)

originated calls. Therefore, until the Commission approves an alternate compensation arrangement or interconnection agreement for wireless-originated traffic, the Commission must interpret and apply the MITG companies' tariffs. The MITG tariffs, including the wireless termination service tariffs, are subordinate to any Commission-approved interconnection and traffic termination agreements. The Cole County Circuit Court, upon review of the MoPSC Report and Order approving the Missouri Wireless Termination Service Tariffs, stated:

> "Upon receipt of a request to establish a reciprocal compensation arrangement under the Act, the small companies have an obligation to negotiate reciprocal compensation arrangements for the transport and termination of telecommunications. Wireless carriers have the right to request such negotiations, and if the negotiations fail to produce agreement, then the Act provides that either carrier may petition the Commission to arbitrate any unresolved matters. Thus, even after the approval of the tariffs, the Act and each one of the tariffs provide a mechanism for the wireless carriers to establish a reciprocal compensation arrangement with the small companies just as they have done with SWBT."[9]

Thus, the Missouri wireless termination service tariffs do not preempt interconnection agreements or reciprocal compensation arrangements.

III. FCC processes for negotiating interconnection and compensation

The Missouri wireless termination tariffs are not unlawful reciprocal compensation arrangements. They are not reciprocal compensation arrangements at all. They are compensation arrangements approved by the MoPSC when no reciprocal compensation arrangement has been pursued by the wireless carrier and approved by the MoPSC. The MoPSC has found these tariffs do not preempt CMRS providers from exercising their rights under sections 251 and 252.

[9] *State of Missouri ex rel. Sprint Spectrum L.P. d/b/a Sprint PCS v. Missouri Public Service Commission*, Findings of Fact, Conclusions of Law, and Judgment, Case No. 01CV323740, pp. 10-11 (November 26, 2001).

A. Process under 332/201

Petitioners cite sections 332 and 201 as the statutory basis for the FCC's authority to declare the state wireless termination service tariffs unlawful. Section 332(c)(1)(B) states:

> "Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

Petitioners' reliance on section 332 is misplaced. The CMRS providers have made no request for a physical connection with the MITG companies. Instead, the CMRS providers have made unilateral arrangements with SWBT to indirectly transit traffic to the MITG networks without making the MITG companies a party to those negotiations. Section 332 provides for a physical connection with a requesting CMRS provider, it does not provide for indirect interconnection, unlike section 251(a) which specifically requires all carriers to connect either directly or indirectly. Section 201 also requires common carriers such as the MITG companies to furnish communications upon reasonable request therefor. The MITG companies have been and currently are terminating the wireless traffic delivered to their networks pursuant to these indirect interconnection arrangements. The MITG companies note that, although the FCC has determined that interconnection agreements are not to adversely affect parties who are not a party to the agreements, the MITG companies have not been compensated by either SWBT or the CMRS providers for their services of terminating this wireless traffic.[10]

SWBT connects with the MITG networks pursuant to these companies state access tariffs. Section 201 states that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Wireless traffic terminated over an indirect connection has been lawfully subject to the MITG access charges. This is true both before and after passage of the 1996 Act.[11] The FCC did not change the interstate or intrastate access services regime with the passage of the 1996 Act.[12]

The Missouri wireless termination service tariffs are a compensation mechanism for wireless traffic terminated to the rural ILEC's network through an indirect interconnection. The rates set forth in the tariffs are lower than the access rates of the three MITG companies who have wireless termination service tariffs. These rates have been found to be just and reasonable by the MoPSC. The MoPSC had evidence of these MITG companies' forward-looking economic costs of providing wireless termination service developed using the HAI forward-looking cost model which showed the MITG companies forward-looking rates were higher than the proposed wireless termination service tariff rates. The Missouri Commission found the MITG companies' costs are high, and that the proposed rates reflect those high costs. The Missouri tariffs are expressly subordinated to Commission-approved interconnection and traffic

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[10] The three MITG companies who have wireless termination service tariffs have begun to receive compensation from CMRS providers, not following the effective date of their tariffs, but following a subsequent complaint before the Missouri Commission (TC-2002-57) to enforce the provisions of their wireless tariffs.

[11] See fn. 1 supra.

[12] *Interconnection Order* at para. 1034.

termination agreements, and therefore do not preclude a request for interconnection pursuant to section 332 and 201, or sections 251 and 252.

B. Process under 251/252

The 1996 Act set forth a procedure by which *requesting* CMRS providers could obtain interconnection with LECs. The Act set forth obligations of telecommunications carriers in section 251.

47 USC 251(a), general duty to interconnect

47 USC 251(a) provides:

"GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—
(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"

Subsection (a) of §251 is silent with respect to compensation. It does not state, as the CMRS providers suggest, that reciprocal *compensation* can be required over an indirect interconnection. All subsection (a) requires is the duty to *interconnect* directly or indirectly. The MITG companies have met the duty to interconnect indirectly. As discussed above, the MITG companies have been accepting and terminating the wireless traffic delivered to their networks through an indirect interconnection. The wireless termination service tariffs do not preclude the implementation of this provision.

47 USC 251(b) (5), duty to establish reciprocal compensation

Subsection 251(b)(5) is the first provision of the 1996 Act that mentions reciprocal compensation:

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties:
(5) RECIPROCAL COMPENSATION.—The duty to establish **reciprocal compensation arrangements for the transport and termination of telecommunications**."

This subsection does not state that there is a duty to establish reciprocal compensation arrangements over an "“indirect interconnection”. Instead the subsection states the reciprocal compensation arrangements are for the “transport and termination” of telecommunications.

FCC rule, 47 CFR 51.701, sets forth the scope and applicability of the reciprocal compensation rules:

“Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

§ 51.701 Scope of Transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation <u>for the transport and termination</u> of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area as established by the state commission;

or

(2) Telecommunications traffic between **<u>a</u>** LEC and **<u>a</u>** CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.022(a) of this chapter.

(c) *Transport.* For purposes of this subpart, <u>transport is the transmission and any necessary tandem switching of local telecommunications traffic</u> subject to section 251(b)(5) of the Act from the <u>interconnection point between the two carriers</u> to the terminating carrier’s end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, <u>termination is the switching of local telecommunications traffic at the terminating carrier’s end office switch</u>, or equivalent facility, <u>and delivery of such traffic to the called party’s premises</u>.

(e) *Reciprocal Compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network of the other carrier."

It is noted that under subparagraph (e), a reciprocal compensation arrangement is applicable between two carriers, not three. Second, the title of this subpart H, as well as the language of all of the subsections to subpart H, specifies that reciprocal compensation can only be applied to local traffic. For wireless traffic, subsection (b)(2) specifies that the intraMTA calling scope is applicable only to traffic exchanged between a LEC and a CMRS provider. The plain meaning of this rule is that reciprocal compensation only applies to traffic exchanged between a single LEC and a single CMRS provider, two carriers. The corollary is that reciprocal compensation does not apply when a third carrier is involved. The definitions used for transport and termination prove this corollary.

The FCC in rule 47 CFR 51.701(c), has defined "transport" for purposes of reciprocal compensation, as:

> "the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch…"

Reciprocal compensation is for the transport and termination of local traffic. Transport is defined as the transmission and switching of local traffic from the interconnection point between the two carriers. There is no interconnection point between the wireless carriers and the MITG companies.

Other provisions of the federal rules suggest that two carriers are contemplated. For instance, 47 CFR 51.713(a) addressing bill-and-keep, states that:

> "For purposes of this subpart, bill-and-keep arrangements are those in which neither of the two interconnected carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network."

47 USC 251(c)(2) provides:

> (c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
> (2) INTERCONNECTION—The duty to provide, for the facilities and equipment of any **requesting** telecommunications carrier, interconnection with the local exchange carrier's network—
> (b) at any technically feasible point **within the carrier's network**"; (emphasis added)

The duty of the ILEC is to interconnect at a point within the ILEC's network. This refers to a direct interconnection. The duty to provide interconnection is owed by the ILEC to a "requesting carrier". This refers to the local competitor—the CLEC or wireless carrier—who starts the interconnection agreement process set forth in section 252 of the Act.

47 CFR 51.5, the definitions section of the federal interconnection rules, defines "interconnection" as "the linking of two networks for the mutual exchange of traffic." This rule is contrary to the "transiting" or indirect interconnection scheme involving three or more carriers. First, the rule requires the linking of <u>two</u> networks, not three. Second, the rule is for the <u>mutual</u> exchange of traffic, which contemplates two carriers, not three. Third, the rule contemplates a mutual <u>exchange</u> of traffic. That does not occur under the transiting scheme, as traffic from MITG exchanges to wireless carriers does not go over the same SWBT trunk, and it is not carried by the same carriers.

When SWBT, Sprint Mo Inc., or Verizon bill for "transit" tandem switching and transport services, they bill out of their state <u>access</u> tariffs.[13] It defies logic and common sense for the MITG companies to have to receive reciprocal compensation when, on the same call, an intermediate carrier bills its "transit" out of its access tariff. The same call should not be subject to both access and reciprocal compensation charges. These incongruities are the result of the logical disconnects encountered in trying to make the "transit" theory work in a structure it was not designed for.

It is the duty of the ILEC to establish reciprocal compensation with *requesting* wireless carriers. SWBT is not the ILEC in MITG exchanges. SWBT did not request an interconnection for reciprocal compensation. Only the MITG companies can enter into reciprocal compensation arrangements for local traffic terminated to them. SWBT and the wireless carriers are not empowered, particularly in the absence of participation by the MITG companies, to negotiate the terms and conditions of reciprocal compensation for traffic terminating to the MITG companies.

The wireless terminating service tariffs do not preempt a request for reciprocal compensation pursuant to the procedures set forth in sections 251 and 252. The MITG have not ignored requests to enter reciprocal compensation arrangements, but have expressed concerns that they do so pursuant to the FCC procedures, and in the same manner as agreed to by CMRS providers with larger ILECs like SWBT. The wireless termination service tariffs are expressly subordinated to any such agreements reached and approved by the State or Federal Commission.

Without a meetpoint within the MITG companies' networks, the MITG cannot reciprocate a call to the CMRS providers. AT&T Wireless and SBC Communications, Inc. have suggested that the CMRS providers and the independent LECs route traffic *to each other* through an RBOC tandem. That is not true for the MITG companies. In Missouri, the CMRS providers and SWBT have unilaterally entered into this transiting arrangement without the participation of

[13] *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al.*, Case No. TC-2002-57, Testimony of Tom Hughes, T. 954-955.

the MITG companies. Another falsity is the wireless carriers' contention that the independent LECs, such as the MITG companies, are simply sending traffic to IXCs to increase their access revenues and to avoid reciprocal compensation agreements with CMRS providers. Under the Commission rules for intraLATA presubscription, the independent LECs are required to route 1+ dialed calls to the customers' presubscribed interexchange carrier until a direct connection agreement is approved, authorizing this traffic to be locally dialed without "slamming" the call.

C. Rural ILEC exemption under section 251(f)

Under section 251(c), incumbent LECs have a duty to provide, to any *requesting* telecommunications carrier, interconnection with the local exchange carrier's network. The Missouri wireless termination service tariffs are expressly subordinated to any interconnection agreement reached and approved by the MoPSC under this section. However, the CMRS providers state they do not want interconnection with the independent LECs pursuant to this provision, and have not requested such interconnection with the MITG companies. The CMRS providers know the rural ILECs are exempt under section 251(f)(1) and attempt to bypass this exemption by taking the position that they have not requested interconnection pursuant to section 251(c). Under section 251(f)(1), section 251(c) does not apply to rural ILECs until they receive a bona fide request for interconnection and the State commission has determined that the request is not unduly economically burdensome, is technically feasible, and is consistent with 47 USC 254 (other than subsections (b)(7) and (c)(1)(D) thereof). This has not occurred in Missouri.

The CMRS providers want the type of *indirect* interconnection they have negotiated in Missouri with SWBT to terminate traffic to the MITG exchanges, but they want the type of compensation arrangement that comes with a *direct* interconnection without complying with the procedures set forth by the FCC. The MITG does not believe any Commission could find the complete lack of compensation for the services of the MITG companies "is not unduly economically burdensome." Furthermore, as discussed above, without direct interconnection, the MITG companies have no authority to treat calls going outside of their calling scope as local without "slamming" the call.

IV. State authority under the Act

States have authority under the act to approve wireless termination service tariffs under section 251(d)(3) and section 261. The MoPSC permitted the transit arrangement between SWBT and CMRS providers provided no traffic was terminated to the rural ILECs until compensation arrangements had been made between the CMRS providers and the rural ILECs. SWBT and the CMRS providers failed to abide by these obligations. The wireless termination service tariffs in Missouri address access and interconnection obligations that have arisen due to the failure of SWBT and the CMRS providers to follow the 'transit' requirements set forth by the MoPSC.

The wireless termination service tariffs are consistent with the Act in that they do not preclude interconnection agreements or reciprocal compensation arrangements, and are expressly subordinate thereto. Under the Act, the CMRS provider can request negotiations, and, if necessary, arbitrate any provisions that are not agreed to in the negotiation process. The wireless termination service tariffs do not prevent implementation of the requirements of the Act. They are simply a state remedy where CMRS providers have failed to proceed pursuant to the Act.

States may enforce tariff provisions that are not inconsistent with the Act. This has been upheld in Federal Courts. In *Michigan Bell v. MCI,* 128 F.Supp.2d 1043 (E.D. Mich. 2001), the U.S. District Court held that "pursuant to the Act, the State may impose and enforce tariff provisions, but cannot enforce a tariff in a manner that violates a party's rights under negotiated interconnection agreement." *Id*. at 1054. The Court also found that, 'State tariffs are obviously not agreements approved under the Act. Further, tariffs are inherently different from interconnection agreements.' *Id*. at 1060.

The wireless carriers assert that the state commissions do not have authority to approve wireless termination service tariffs. USCellular and Verizon Wireless cite the *Bell Atlantic v. Global NAPS*/*Global NAPS v. FCC* line of cases[14] for the position that "using the tariff process to circumvent Section 251 and 252 processes cannot be allowed." The matter addressed in the *Global NAPS/Verizon* cases falls within the prohibition stated in *Michigan Bell* that tariffs may not violate a party's rights under negotiated interconnection agreements. The *Global NAPS/Verizon* line of cases is clearly distinguishable from the wireless termination service tariffs approved by the states. First, the companies involved, Global NAPS (GNAPS) and Verizon (formerly known as Bell Atlantic), already had a negotiated interconnection agreement in place before the tariff in question was filed. Second, the tariff was a Federal tariff, not a State tariff. Third, "[t]he FCC found that the challenged tariff provisions violated the requirement of 47 C.F.R. §61.2 that tariffs be 'clear and explicit' because 'those tariff provisions condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today.' (cite omitted) Additionally, the FCC found that the tariff impermissibly cross-referenced another document – in this case the interconnection agreement between GNAPs and Verizon – in violation of 47 C.F.R. §61.74(a)."[15]

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[14] Comments of Verizon Wireless at p. 4; Comments of United States Cellular Corporation at p. 3; citing Bell Atlantic v. Global NAPS, 15 FCC Rcd 12946, 12959 para. 23 (1999); aff'd on recon. 15 FCC Rcd 12946 (2000), aff'd sub. nom. *Global NAPS, Inc. v. FCC*, 247 F.3d 252 (D.C.Cir. 2001)

[15] *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 256 (D.C.Cir. 2001)

The Missouri wireless termination service tariffs do not address provisions already contained in an interconnection agreement; they contain compensation terms when no interconnection agreement has been requested and approved, and are expressly subordinated to any requested and approved interconnection agreement. Furthermore, these state tariffs have been approved by the MoPSC. The compensation rates were deemed just and reasonable, and the tariffs were not found to have any legal infirmities.

The FCC's February 20, 2001 decision was challenged by Global NAPS before the United States Court of Appeals, District of Columbia, and a subsequent decision was rendered June 4, 2002.[16] In that case, the Court supported the FCC's interpretations "that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option. Under this reading, the purpose of § 252(e)(5) is to hold out the FCC as an alternative forum for the adjudication of certain disputes related to interconnection agreements; the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such disputes."[17]

In approving the wireless termination service tariffs, the state commission has not failed to act in Missouri. Since the FCC has taken the position and determined it is not authorized to sit as an appellate tribunal to review the correctness of state resolution of interconnection agreements, the Commission should similarly find that it is not authorized to sit as an appellate tribunal to review the correctness of state tariffs that do not preempt provisions of an approved interconnection agreement and reciprocal compensation arrangement nor preclude negotiation or arbitration of interconnection agreements and reciprocal compensation arrangement under the Act. The CMRS providers have brought a state court action pertaining to the lawfulness of the

Missouri state tariffs that is currently pending before the Missouri Court of Appeals, Western District, case number WD60928. This direct judicial review is the correct forum for this matter.

V. Imposing 'de facto' bill-and-keep

The CMRS providers unilaterally enter into transit arrangements with tandem providers, usually RBOCs, to deliver the CMRS traffic to independent LECs over common trunk groups along with other traffic that the receiving independent LEC cannot identify or block. The CMRS providers then refuse to pay for the traffic they originate, imposing 'de facto' bill and keep as a form of 'compensation' all the while they cite pre-Act FCC requirements and orders for negotiating interconnection agreements and post-Act FCC requirements for negotiating interconnection agreements trying to create confusion over intercompany compensation requirements in this situation. The fact is that the CMRS providers have not sought interconnection agreements with the MITG companies. CMRS providers have not filed with the MoPSC bona fide requests for interconnection agreements with these rural carriers. The pre-Act and post-Act interconnection requirements are inapplicable where the CMRS providers fail to avail themselves of the interconnection procedures under the Act.

AT&T Wireless touts the benefits CMRS providers have realized by following the procedures of section 251 and 252 set forth in the 1996 Act. AT&T Wireless would then have this Commission believe that independent LECs like the MITG companies have refused to negotiate interconnection agreements with AT&T Wireless pursuant to sections 251 and 252. Don't be misled. While AT&T Wireless and other CMRS providers have negotiated direct interconnection agreements pursuant to sections 251 and 252 of the Act with RBOCs and other

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[16] *Global NAPS, Inc. v. Federal Communications Commission, et al*., 291 F.3d 832 (D.C.Cir. 2002).
[17] *Id*. at 837.

large ILECs to their benefit, they have not requested direct interconnection agreements with independent LECs such as the MITG companies. It is disingenuous for them to tout the benefits they have received by following the FCC procedures under sections 251 and 252 with large LECs, then complain that the procedures don't work when they have failed to follow the same procedures with the independent LECs. AT&T Wireless states at page 7 of it's comments that "No one disputes that the negotiation of individual interconnection agreements with each interconnecting carrier can be a cumbersome and expensive process, but that process has proven to be the best way to establish fair, just and reasonable rates, terms and conditions for interconnection." However, counsel for AT&T Wireless argued before the Missouri Court of Appeals, on behalf of itself and other CMRS providers, that the CMRS providers prefer not to follow the FCC procedures of requesting arbitration with the small rural ILECs of Missouri, citing concerns about the cost of individual arbitration. The wireless termination service tariffs do not preclude AT&T Wireless or any other CMRS provider from following the same FCC procedures for interconnection with independent LECs as they have followed with large ILECs.

Instead, the CMRS providers assert their preference for indirect interconnection with small and rural LECs, and claim a right to 'de facto' bill and keep. AT&T Wireless suggests 'de facto' bill and keep is the result of the unilateral agreements between CMRS providers and RBOCs in conjunction with the Act.[18] There is no mention of 'de facto' bill and keep in the Act. Under 47 CFR 51.705 and 51.713, a *state commission* may establish an incumbent LEC's rates for transport and termination of local telecommunications traffic on a bill-and-keep basis for *two interconnecting* carriers if the state commission determines the carriers costs are symmetrical and that the local telecommunications traffic is roughly balanced and is expected to remain so.

[18] Initial Comments of AT&T Wireless, p. 3.

Wireless carrier claims of "defacto bill and keep" are false in every sense of reciprocal compensation principles. The MITG companies have never agreed to bill and keep. There is no Commission-approved agreement containing bill and keep. There has been no arbitration ordering bill and keep. There has been no required showing of balance of traffic, or a showing that the two carriers costs were symmetrical, FCC prerequisites to approving an agreement containing bill and keep. 'De facto' bill and keep has not *developed* under the Act as suggested by AT&T Wireless, but is a notion that has been *imposed* by CMRS providers and RBOCs who refuse to compensate independent LECs for the services they provide in terminating wireless traffic on their networks. 'De facto' bill and keep is telecommunications highway robbery.

VI. Negotiating for direct interconnection is not in bad faith.

The CMRS providers cannot dispute that the arrangements the MITG wished to negotiate are the same type of protections and interests that these same wireless carriers have already agreed to with SWBT.[19] MITG companies want direct connections because they want to be able to measure the traffic, record the jurisdiction of traffic, agree to billing arrangements, collection arrangements, and service termination arrangements, just as SWBT has done.

The MITG companies are just as entitled as SWBT to negotiate for the same rights with the wireless carriers that SWBT successfully negotiated for. The law is the same for all ILECs. Any MITG company is an ILEC in its own exchanges equal to the legal status of SWBT as an ILEC in its exchanges. It is unreasonable for the wireless carriers to even contend that the MITG

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[19] *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al*., Case No. TC-2002-57, Hearing (August 5-9, 2002) See Exs 48, 50, and 63. Sprint PCS as far back as November of 1997 admitted that, although it was an administrative burden to Sprint PCS, it was required to negotiate its own agreements with the independent Missouri LECs, and that its existing agreements with SWBT and GTE "do not purport to govern the terms and conditions of interconnection with third parties". Ex 66.

negotiated in bad faith by requesting the opportunity to negotiate for direct interconnection, and by taking the position they were not responsible to pay reciprocal compensation for 1+ landline to wireless traffic. The claim of the wireless carriers that the forward looking reciprocal compensation rates proposed by the MITG companies constituted "bad faith" is completely unsubstantiated.[20]

While these rates may be more than the wireless carriers wanted to pay, the fact remains that there is a process in place to resolve these differences. While the wireless carriers may disagree that we are entitled to require a direct interconnection, or dedicated facility, there is a process to resolve that dispute. While they may disagree with us that we are not responsible for return traffic carried by IXCs, there is a process to resolve that dispute. That process is the arbitration provisions of the Act.

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[20] When the largest national wireless carriers—Cingular, Sprint PCS, and Verizon Wireless—did their first negotiations in Missouri, they negotiated with their own affiliates. The reciprocal compensation rates negotiated with their own affiliates did not need to be based upon forward looking costs. One affiliate's expense becomes the other affiliate's revenue. In terms of the precedent established for other ILECs with no national wireless affiliate, SBC, Sprint, and Verizon had an interest in these reciprocal compensation rates being as low as possible. But SWBT went a step further and had its agreements address traffic destined for ILECs other than SWBT. This helped set the stage for the current impasse.

When the wireless carriers made interconnection requests of the MITG companies, their traffic was terminating whether an agreement was approved or not. When the MITG companies provided forward looking costs that were comparable to their own access rate elements, the wireless carriers simply denied that that could be true. They claimed it could not be true simply by comparing non-cost based rates that were negotiated in substantial part with their own affiliates. No wireless carrier has ever disputed, on a cost basis, the forward looking cost calculations the Missouri small ILECs have done. The non-cost-based rates wireless carriers negotiated with their own affiliates may be less than 2 cents per minute. This does not mean that cost based rates of high-cost small rural Missouri ILECs will be at the same level. The wireless carriers refuse to even recognize the possibility that, if small rural ILEC costs are five times higher than urban ILEC costs, small ILEC access rates may be five times higher for good reason, and our forward looking reciprocal compensation rates may legitimately be many times higher.

VII. Additional issues with indirect interconnection

Small rural ILECs have the same legal status under the Act as RBOCs and large ILECs. MITG companies want direct connections because they want to be able to measure the traffic, record the jurisdiction of traffic, agree to billing arrangements, collection arrangements, and service termination arrangements, just as SWBT has done. The MITG companies do not want to be precluded from their valid business preferences of monitoring their own traffic, recording their own traffic, and billing from their own records where they know the terminating carrier and can jurisdictionalize the calls, as opposed to being forced to accept and pay for the services of intermediate RBOCs and large ILECs.

The ability to obtain this type of call detail information is essential. For instance, in their initial comments, Verizon Wireless asserts that most CMRS-LEC traffic is carried over trunks between a smaller LECs end office and larger LECs tandem is intraMTA and therefore jurisdictionally local under 51.701(b).[21] The jurisdictional nature of the call is not based on the transit provider's location, it is based on where the call is originated.[22] In Missouri, many wireless carriers have testified that they do not retain the call detail information of where the call originated.[23] That jurisdictional information is not provided to the MITG companies in the CTUSR records issued by the wireless carriers' transit provider, SWBT. The MITG companies have no way of determining the jurisdictional nature of the wireless traffic terminated onto their networks when traffic is terminated on an indirect basis.

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[21] Comments of Verizon Wireless, p. 9, fn. 23.
[22] 47 C.F.R. 51.701(b)(2).
[23] Hearing, *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al.*, Case No. TC-2002-57 (August 5-8, 2002).

United States Cellular states in it's comments that it's practice in Missouri is to adopt a bill and keep interconnection arrangement with ILECs until it has a PUC approved negotiated interconnection agreement in place.[24] USCellular further states that Missouri LECs began billing USCellular at terminating access rates for calls which are indisputably local, and that USCellular had to hire local counsel to contest these "unlawful" tariffs and charges.[25] The case that USCellular is referring to is *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al*., Case No. TC-2002-57. USCellular alone is responsible for about ½ of the traffic at issue in this case.

Prefiled testimony indicated that, USCellular agreed that most of its traffic destined for Mid-Missouri was inter-MTA traffic (for which access compensation applied).[26] At hearing, evidence was adduced that, as the traffic of USCellular was interMTA, USCellular agreed an interconnection agreement was of no use. USCellular withdrew from negotiations, continued to send interMTA access traffic, and SWBT continued to report access traffic in CTUSR reports no entity has paid for.[27]

Despite all of this evidence, USCellular did not file any rebuttal testimony.[28] USCellular did not cross-examine any MITG witness. As a result, the MITG companies' cases against USCellular have not been contradicted by *any* evidence USCellular proffered in the record.

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[24] Comments of United States Cellular Corporation, p. 5.
[25] Id. at pp. 5-6.
[26] *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al*., Case No. TC-2002-57, Ex 2, Jones surrebuttal testimony, p 33.
[27] *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al*., Case No. TC-2002-57, Ex 70, Ex 71, cross examination Jones, T. 252-253.
[28] *Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al*., Case No. TC-2002-57, Ex 2, Jones surrebuttal, p 4.

Like USCellular, other CMRS providers in Missouri similarly have indicated that it is their *practice* to adopt a 'de facto' bill and keep arrangement with the rural ILECs until they have a PUC approved negotiated interconnection agreement in place. Such arrangements have not been negotiated or agreed to by the MITG companies. The CMRS providers have no legal authority on which to impose 'de facto' bill and keep. By engaging in this practice, these CMRS providers are in violation of 47 C.F.R. section 20.11(b)(2) which requires that "[a] commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."

Furthermore, these CMRS providers impose 'de facto' bill and keep as an ongoing obligation on rural ILECs with respect to interconnection and reciprocal compensation, stating that this is the 'default' reciprocal compensation mechanism for indirect interconnection. The FCC has recently found "that an agreement that creates an ongoing obligation pertaining to ... reciprocal compensation, interconnection ... is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[29] It has not been the *practice* of these CMRS providers to file these 'de facto' bill and keep arrangements with the Missouri Commission. This *practice* of these CMRS providers is not in compliance with Federal statutes, regulations or orders.

VIII. Wireless Termination Tariffs address the problem of no compensation, no request to negotiate interconnection

The wireless carriers filing comments to the T-Mobile Petition have inaccurately described the nature, intent, purpose and history underlying the Missouri wireless termination

[29] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual*

tariffs. The tariffs are state tariffs establishing a rate of compensation for the services of the MITG and other small carriers in terminating wireless traffic delivered on an indirect basis when the wireless carriers have failed to avail themselves of the FCC procedures for interconnection. The duties to establish reciprocal compensation arrangements and to interconnect with requesting telecommunications carriers under sections 251(b)(5) and 251(c)(2) fall on LECs and ILECs respectively, not CMRS providers. The duty to negotiate a request for interconnection falls on ILECs under section 252, not CMRS providers. Since CMRS providers have no duty to negotiate or establish reciprocal compensation arrangements or interconnection agreements, the independent LECs cannot initiate and force these arrangements onto the CMRS providers under the Act. The CMRS providers incorrectly suggest that the independent LECs can avail themselves of these procedures under the Act.

IX. Conclusion

Pursuant to 5 U.S.C. § 554(e) the FCC "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." Here there is no controversy or uncertainty. The CMRS providers have not sought interconnection in the independent LEC exchanges pursuant to the procedures under the Act -- either under sections 332 and 201, or sections 251 and 252. Without undertaking the obligations to interconnect under the procedures set forth in the Act, the CMRS carriers cannot obtain the compensation benefits for interconnection under the Act. The CMRS providers simply seek to make an end-run around the FCC procedures though this declaratory judgment action. There is already a process to resolve the issues raised by CMRS providers in their Petition and comments. That process is the

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Arrangements under Section 252(a)(1), Memorandum Opinion and Order, WC Docket No. 02-89, para. 8 (released October 4, 2002).

negotiation and arbitration provisions of the Act. The Petition of T-Mobile USA, Western Wireless Corporation, Nextel Communications, Inc. and Nextel Partners, Inc. should not be granted.

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